Supreme Court of the United States

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President of Committee of Yonkers Commuters, etc.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEE, THE NEW YORK CENTRAL RAILROAD COMPANY

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Opinions Below

The opinion of the specially constituted District Court (R. 380), *Public Service Commission of State of New York, et al. v. United States, et al.*, is in 50 F. Supp. 497.

The report of the Interstate Commerce Commission, dated March 20, 1943, in Finance Docket No. 13914 (R. 71), *New York Central Railroad Company Abandonment*, is not officially reported.*

* The Commission's mimeographed release of the report bears the legend "This report will not be printed in full in the permanent series of Interstate Commerce Commission reports."

Jurisdiction

The proceeding in the court below was commenced under the provisions of acts approved June 10, 1910 (38 Stat. L. 1149) and October 22, 1913 (38 Stat. L. 219), commonly referred to as the Commerce Court Act and the Urgent Deficiencies Act, Title 28 U. S. C. Section 41 (28) and Sections 43-48, inclusive, which have to do with suits brought to enjoin and set aside orders of the Interstate Commerce Commission.

The direct appeal from the final decree of the court below was taken to this Court under the provisions of Title 28, U. S. C. Sections 47a and 345.

Probable jurisdiction was noted by this Court on June 21, 1943 (R. 400).

Statutes Involved

The proceeding before the Interstate Commerce Commission was commenced under the provisions of Section 1(18) to (20), inclusive, of the Interstate Commerce Act (49 U. S. C. Sec. 1 [18] to [20]). These provisions, together with paragraph (22) of Section 1, which appellants claim to be applicable, are reproduced in the Appendix.

Statement

The Proceedings

The order under attack is in the form of a certificate of public convenience and necessity certifying "That the present and future public convenience and necesssity permit abandonment by The New York Central Railroad Company of the branch line of railroad in Bronx and Westchester Counties, N. Y., described in the aforesaid report. * * *" (R. 78-9). Neither the order nor the accompany-

ing report, which is made a part thereof, contain language purporting to authorize The New York Central Railroad Company to abandon any part of "an intrastate, inter-urban, electric passenger railway", as is inferred on page 1 of the brief of appellant, John W. Tooley, Jr.

Application to abandon the line, described as "a Line of Railroad between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York", was made on August 20, 1943 (R. 11). Public hearing was held in the City of Yonkers before an examiner of the Interstate Commerce Commission on November 12, 1942 (R. 175). The Application and Return to Questionnaire were received* as a part of the record (R. 176), and applicant produced witnessess to amplify and explain the Return to Questionnaire, which in itself contains a full statement of the applicant's case (R. 14). Twenty-three witnesses, who were for the most part commuters on the line, appeared in opposition (R. 264, 274-331). The commuters were represented by a committee of which John W. Tooley, Jr., appellant here, was chairman (R. 287). The City of Yonkers and the Public Service Commission of the State of New York also appeared as protestants (R. 176). The City of New York appeared in support of the application (R. 108).

Four months after the oral hearing a proposed report was served upon the parties (R. 31). Various protestants filed exceptions to the proposed report (R. 37, 44, 57), and applicant filed a reply to the exceptions (R. 61), following which attorneys, including attorneys for appellants, presented oral argument before Division 4 of the Commission (R. 349, 358, 366). Appellants, as protestants

* Rule 19 of the Commission's Rules of Practice provides as follows:

"PLEADINGS PART OF RECORD. Recitals of material and relevant facts in a pleading, filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record."

before the Commission, raised no question as to the Commission's jurisdiction either in their written exceptions (R. 37-42, 44-52) or in their oral presentations (R. 358, 366). Their attacks were directed to factual matters and the proposed finding that continued operation of the line would impose an undue burden upon the applicant and upon interstate commerce.

The report of the Commission, Division 4, issued on March 20, 1943, adopted, substantially, the proposed report (R. 71). Appellants thereupon filed omnibus petitions (R. 79, 92) for further hearing, rehearing, etc., stressing that the Commission erred in finding that continued operation of the line would be a burden upon interstate commerce (R. 81), that the Commission had no jurisdiction because the line was entirely intrastate (R. 83), and that the case should be reopened to permit introduction of new evidence showing (1) possible reduction in assessed valuation of the line within Yonkers (R. 85), and (2) a plan to extend a certain New York City subway in the post-war period (R. 93). The claim, raised for the first time, that the line was an exempted interurban electric railway under Section 1(22) of the Interstate Commerce Act was not stressed (R. 87, 96).

In its reply to these petitions the applicant pointed out that the tax reduction was not a fact and would, at best, be uncertain, and that it offered too little and came too late (R. 106); that the suggested subway extension was speculative and remote, and would make little difference in the traffic volume (R. 104).

The Corporation Counsel of the City of New York also filed a memorandum in opposition to protestants' petitions for further hearing (R. 108).

Rehearing was denied on May 10, 1943 (R. 110), the Commission's order reciting that it was entered upon further consideration of the record and of "the petitions of

the protestants for rehearing and of the answers of the applicant and the City of New York to said petitions:".

The review proceeding in the court below, commenced on May 21, 1943, was heard on its merits on June 2, 1943 (R. 118). The Public Service Commission of the State of New York took the leading part in the court below (R. 123-136), but has not joined in the appeal before this Court.

The decision dismissing the bill of complaint was filed on June 10, 1943 (R. 380), and judgment was entered the same day (R. 385). The statutory court granted a temporary stay of proceedings to June 19, 1943, to permit application to be made to this Court for a further stay (R. 387). Such application was made but it was not granted. A motion to affirm under Rule 12 was denied and probable jurisdiction was noted by this Court on June 21, 1943 (R. 400).

Description of the Line and the Area Served by it

The location of the line to be abandoned, particularly its relation to other New York Central lines and transportation facilities which figure in the case, appears on the maps which are a part of the record (R. 332, 348A, 370B), particularly Exhibit 2 before the Interstate Commerce Commission (R. 332).

The Hudson and Harlem Divisions, the principal passenger carrying lines of the New York Central in the New York metropolitan area, use the same tracks from Grand Central Station to about 150th Street (Mott Haven Junction), which is north of the Harlem River. From this point the Harlem Division continues directly north, and, after it has gone through the Borough of Bronx, has several stations very close to the easterly boundary of the City of Yonkers (R. 182). The Hudson Division tracks turn in a westerly direction near 150th Street (Mott

Haven Junction), follow the north bank of the Harlem River to the Hudson River and thence along the east bank of the Hudson River through Yonkers to Albany (R. 181). This division has four stations, Ludlow, Yonkers, Glenwood and Greystone, within the limits of the City of Yonkers (R. 181). Only the first two stations are within the area involved in this case. The Hudson and Harlem Divisions are electrified within the New York metropolitan area.

The New York Central also has another less important line, known as the Putnam Division main line. The passenger trains of this division do not run into Grand Central Station, though there are connecting tracks to the Hudson Division (R. 210, 370B). Putnam Division tracks begin at Sedgewick Avenue station (161st Street), in the Borough of Bronx, parallel the Hudson Division tracks along the Harlem River through joint stations at High Bridge, Morris Heights and University Heights and then continue north through an area in the Bronx and the City of Yonkers half way between the Hudson and Harlem Division tracks. Excepting the line and the service involved in the abandonment proceeding, Putnam Division operations are entirely by means of steam (R. 182).

The line to be abandoned, here called the Yonkers Branch, is a part of the Putnam Division (R. 13). It was electrified in 1926 as the result of public pressure and state law (R. 182, 221).* The line branches off the Putnam at Van Cortlandt Park Junction in Van Cortlandt Park, New York City, and proceeds in a northwesterly direction across the city line to Getty Square station in the heart of the Yonkers business district not far from Yonkers station on the Hudson Division. The stations to be abandoned are Caryl, Lowerre, Park Hill and Getty Square (R. 182).

* The law was declared invalid by the United States District Court, Southern District of New York, in *Staten Island Rapid Transit Co. v. Public Service Comm.*, 16 F. (2d) 313, on account of conflict with Federal Safety Appliance Act.

Caryl and Lowerre are the most important (R. 223). The line from Van Cortlandt Park Junction to Getty Square which will be taken up is 3.1 miles long (R. 11, 180). It is laid with 100 and 105 pound rail (R. 182). Electrical devices on Putnam Division main line used in rendering through service from Sedgewick Avenue to Getty Square will also be removed (R. 182). Steam operations will continue over Putnam Division tracks formerly used jointly for steam and electric operations.

A connection was formerly afforded at the Sedgewick Avenue end of the line to the Sixth and Ninth Avenue elevated trains which crossed the Harlem River on a bridge used until 1916 to carry Putnam Division trains across the river and down to 155th Street on Manhattan (R. 184, 239). The elevated lines were dismantled in 1938 and 1940, leaving, however, a segment of the line extending from Jerome Avenue (Lexington Avenue subway) on the east past Sedgewick Avenue station and across the Harlem River on the old railroad bridge to another subway at 155th Street (R. 194). A so-called shuttle service is operated over this segment. The newly discovered evidence which the commuters sought to introduce at a rehearing had to do with a plan to extend, after the war, the end of the Lenox Avenue subway that now stubs at 145th Street to connect with the shuttle tracks at 155th Street, thereby restoring Sedgewick Avenue as a station on a through city transportation line (R. 93).

The Yonkers Branch, together with the balance of the Putnam Division, has been operated by the Central or predecessor companies for more than fifty years (R. 15). There was a lessor corporation in existence until its merger with The New York Central and Hudson River Railroad Company in 1913. The latter company was in turn consolidated with other companies to form the present company in 1914 (R. 15).

The competing transportation agencies or routes remaining in the field are chiefly: (1) the Broadway trolley line which runs west of and parallel to the Yonkers Branch for its entire length, providing access to a New York City subway at 242nd Street (R. 18, 191, 229-238); (2) the Club Transportation bus lines which provide service between the Caryl and Lowerre areas and Ludlow station on the Hudson Division (R. 18, 192, 257-264); and (3) the McLean Avenue trolley line which goes east to Lincoln station on the Putnam Division main line and proceeds still further to a connection with a New York City subway (Lexington Avenue line) at Woodlawn (R. 18, 192). The service offered by these agencies, though not quite as convenient as the Yonkers Branch service, is adequate and is reasonably priced.

Results of Operation

The additional patronage expected after the electrification in 1926 did not materialize (R. 24, 221). A decline commencing with the onset of the economic depression in the 1930s continued so that at the time of the hearing patronage was only 25 per cent of what it had been 12 years before (R. 24). The slight recovery as a result of the war boom and the rubber shortage has not been comparable to that experienced by applicant's other lines and by competing transportation agencies and offers no hope for the future (R. 24, 204).

Based upon average revenue and expense for the years 1940 and 1941, operation of the line produces a yearly out-of-pocket loss of at least $56,941 (R. 24). This is a conservative statement of the loss (R. 100-103). The branch was given credit for all revenues from the sale of tickets to or from points on the Yonkers Branch without deduction of expense items connected with transporting the passengers on the Hudson Division (R. 205). Nor was any allowance made for revenue that will be retained on account of a substantial number of passengers using ap-

plicant's other lines upon abandonment of service on the Yonkers Branch (R. 205). See further in this connection applicant's reply to petitions for further hearing (R. 100-103).

Only 2.4 per cent of the traffic on the line is local to the part to be physically abandoned (R. 30, 199). 23.4 per cent is Sedgewick Avenue business and represents the portion making connection to city subways (R. 199). 62.9 per cent of the Yonkers Branch passengers transfer to or from points on the Hudson Division, principally Grand Central Station (R. 30, 199).

Evidence showing Line is Operated as a Part of a General Steam Railroad System

All Yonkers Branch passengers transferring to or from Grand Central Station must be accommodated on Hudson Division as well as Yonkers Branch trains (R. 30, 187-8). If after the abandonment Yonkers Branch passengers do not come over to Hudson Division stations and use Hudson Division trains direct to Grand Central, it may be possible to eliminate cars on certain Hudson Division trains (R. 205).

Twenty-eight of the thirty Yonkers Branch trains which make daily connections with Hudson Division trains do so at High Bridge station, and the other two trains (one in each direction) make connection at University Heights station (R. 188). Train schedules introduced as exhibits and testimony adduced at the hearing before the Commission show that service to points on the Yonkers Branch is provided by a co-ordination of Yonkers Branch and Hudson Division trains (R. 188, 252-4). The Yonkers Branch schedule furnished to the public shows the connecting Hudson Division trains on the same sheet (R. 332).

Tickets sold between Grand Central Station and points on the Yonkers Branch carry optional privileges per-

mitting use at certain stations on applicant's other lines in and near Yonkers (R. 224, 344). The published tariffs specify the options (R. 344). A ticket from Grand Central Station to Park Hill, for instance, is also good to Ludlow on the Hudson Division, to Mt. Vernon on the Harlem Division, and to Lincoln on the Putnam Division (R. 344).

The eleven multiple-unit cars, valued at $235,000 (R. 24), used in rendering service on the Yonkers Branch are the same as those used on the Hudson and Harlem Divisions (R. 186). One reason for abandoning service at the present time is to permit fuller use of the cars on the other metropolitan divisions, thereby releasing an equivalent number of standard coaches now used on those divisions (R. 186-7, 238). The coaches to be released are needed to accommodate the high tide of civil and military traffic the railroads are now experiencing (R. 187). This feature of the case was fully explained in the oral argument before the court below (R. 156-160).

Employees who operate trains on the branch are in the same seniority district as employees who operate main line trains on the Putnam Division and the men operate both Putnam Division and branch line trains during one tour of duty (R. 204-5, 245-6).

The Commission's Report

Division 4 of the Commission wrote what the court below described as "a careful opinion" (R. 383). It contains a full recital of the pertinent facts and explains the basis of the Commission's action (R. 71-8). It would be unduly repetitious of what is already contained herein to detail what is said by the Commission. The court below reviewed the record and said, "Under the circumstances the evidence before the Commission was adequate, and the Commission's conclusion well within its authority" (R. 383).

By way of an index to the report rather than as a summary, it may be pointed out that the report gives a full description of the branch and its history (R. 72), the territory served (R. 72), the service now and formerly offered (R. 73), the service offered by, and the time consumed in, using other lines of the New York Central and those of competing agencies (R. 74-5), effect of abandonment upon real estate values in Yonkers (R. 75), number of passengers carried and financial results of operation—loss of $56,941 per year (R. 75-6), material in the line, including 11 cars, that may be salvaged or released for use elsewhere (R. 77), and the decline of patronage to about 25 per cent of what it was 12 years ago (R. 77).

The ultimate findings of the Commission are as follows:

> "It is apparent from the record that the line in question is being operated at a substantial loss to the applicant, and that there is no prospect of more favorable results for the future. Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce.
>
> "We find that present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of the line of railroad in Bronx and Westchester Counties, N. Y., described herein. An appropriate certificate will be issued, effective from and after 40 days from its date, in which suitable provision will be made for the cancellation of tariffs" (R. 78).

Summary of Argument

1. The Yonkers Branch is an electrically operated branch of a steam railroad. It is not, as appellants contend, a suburban or interurban electric railway excepted under Section 1(22) of the Interstate Commerce Act from the abandonment authority conferred upon the Commission by Section 1(18). The branch is not separately incorporated nor separately operated, has no officers, employees, records or funds of its own, and functions only as a branch of a steam railroad. The appellants' contention that the line is an electric railway not only disregards the facts of record, but is an overliteral interpretation of the language of Section 1(22) already repudiated by this Court in *Piedmont & Northern R. Co.* v. *Interstate Commerce Comm.*, 286 U. S. 299.

2. Even though it be assumed for purposes of argument that the Yonkers Branch is a suburban or interurban electric railway, it is nevertheless operated as a part of the New York Central's steam railroad system of transportation, and, on that account, is outside the exemption of suburban and interurban electric railways contained in Section 1(22). Many facts of record establish that the line is so operated, including that (1) the New York Central or its predecessors have operated the line for over 50 years; (2) schedules of Yonkers Branch trains are coordinated with schedules of main line trains; (3) a large proportion of the passengers using the branch not only require accommodations on branch line trains but also on trains operating upon the main line; (4) tickets used on the branch carry optional privileges permitting use on other lines; (5) the equipment used on the branch is the same as that used on other suburban lines and is needed to relieve a shortage of standard equipment required for the transportation of both civil and military traffic; (6) employees operating trains on the branch also work on the Putnam Division main line trains and the Yonkers Branch trains operate over the Putnam Division main line for part of their run; (7) the Board of

Directors of The New York Central Railroad Company considers the branch to be a part of its railroad; and (8) the Interstate Commerce Commission found the branch to be a part of applicant's line of railroad, and that its continued operation would constitute an undue and unnecessary burden upon the applicant and upon interstate commerce.

3. Appellants are in no position to complain about lack of findings in the Commission's report as to whether the branch is a suburban or interurban electric railway within the intendment of Section 1(22), since they offered no evidence thereon and requested no findings pertaining thereto. An established rule of statutory construction requires that where an exception appears in a different section or subdivision of a statute than does the enacting clause, as is the case here, the party relying on the exception must allege and prove that his case comes within it. This rule is especially applicable here because the report of the Commission contains all the affirmative findings necessary to an exercise of jurisdiction in the premises and the lack of a specific negative finding as to whether the line is a suburban or interurban electric railway does not affect the basis of the Commission's decision.

4. All other points raised by appellants have already been determined adversely to them by this Court in other cases. Whether, for instance, the continued operation of the line would impose an undue and unnecessary burden upon the applicant and upon interstate commerce, as found by the Commission, is not subject to redecision by this Court. *Purcell* v. *United States*, 315 U. S. 381. The case raises no new or novel issues respecting conflict between state and federal authority which have not been fully disposed of in numerous cases, including *Colorado* v. *United States*, 271 U. S. 153, and *Transit Commission* v. *United States*, 284 U. S. 360. No substantial claims are raised as to lack of due process or fair hearing.

POINT I

The Yonkers Branch is not a suburban or interurban electric railway within the intendment of Section 1(22) of the Interstate Commerce Act.

Appellants maintain that the Commission's order authorizing abandonment of the Yonkers Branch is invalid on the ground that the line, though long owned and operated by The New York Central Railroad Company, is nevertheless a suburban or interurban electric railway and therefore exempted from the Commission's jurisdiction by Section 1(22). They claim that this branch line is such a railway because it runs in a suburban or interurban area, has electric power and carries only passengers. Such restricted or literalistic interpretation of the language of Section 1(22) has, however, been already repudiated by this Court in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm.*, 286 U. S. 299. It is there pointed out that the exemption in the statute must be construed so as to give effect to the broad purposes of the legislation of which it is a part and also with a view to the special position that electric railways had in 1920 when the legislation was passed.

Concerning the broad purposes of the Transportation Act of 1920 it is only necessary to refer to *Railroad Comm. of Wisconsin* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 585, *New England Divisions Case*, 261 U. S. 184, 189, *Dayton-Goose Creek Ry. Co.* v. *U. S.*, 263 U. S. 456, 478, *Texas & Pacific R. Co.* v. *Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266, 277, and *Colorado* v. *U. S.*, 271 U. S. 153. These notable decisions established that the increased powers over intrastate rates, divisions, recapture of earnings, extension and abandonment of lines, etc., given to the Interstate Commerce Commission by the Transportation Act of 1920, are to be administered for the purpose of building up, in an affirmative way, a national transportation

system. In order to achieve this great purpose the railway systems of the country, in the language of the *Dayton-Goose Creek* opinion, were put more completely than ever "under the fostering guardianship and control of the Commission." One of the great concerns of Congress was to prevent the dissipation of railroad earnings in unprofitable local operations to the prejudice of interstate commerce. As was said in *Colorado v. U. S., supra*, page 103:

> "* * * Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. * * *"

The special field that suburban and interurban electric railways occupied in 1920 when the Transportation Act of that year was passed has become, since the advent of the intercity bus line and the almost universal ownership of motor cars, hardly more than a memory. As is pointed out in the *Piedmont & Northern* decision, page 307, these organizations retained many of the characteristics of street car companies:

> "* * * These are essentially local, are fundamentally passenger carriers, are to an inconsiderable extent engaged in interstate carriage, and transact freight business only incidentally and in a small volume. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distinct communities, and that in addition so-called interurban lines were constructed from time to time, to serve the convenience of two or more cities. But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars. Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along

> the line or received for local delivery from connecting steam railroads. It is clear that the phrase 'interurban electric railway' was not, in 1920, commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars. It cannot be said, therefore, that if a railway is operated by electricity and extends between cities paragraph (22) clearly and unequivocally exempts it from the Commission's jurisdiction."

Appellants misconstrue the *Piedmont & Northern* decision when they attempt to apply the above quoted language to the facts of this case. True enough, the Yonkers Branch carries no freight, was built for passenger business, and is operated by means of single or series of self-propelled electric cars, but this does not make it an electric railway within the intendment of the statute.

A consideration of the precise language of the statute makes plain that the clause exempting electric railways covers a class of operating companies rather than a type of operation. The exemption is not, in other words, of electric operations as such, but of operations by electric railways, a very different matter. Paragraph (22) first provides that the authority conferred by paragraphs (18) to (21) shall not extend to "spur, industrial, team, switching or sidetracks, located or to be located wholly within one State * * *." The emphasis here is upon tracks and types of tracks that are excluded from the Commission's jurisdiction. Tracks over which electric operations are conducted are not expressly excluded and, indeed, there would be, in view of the purpose of the statute, no reason for excluding them. The next exception (though a limited one) is of "street, suburban or interurban electric railways * * *." It is, in striking contrast to the previous exception as to spur tracks, etc., a reference to operating companies. The entire operations of such companies, interstate and otherwise, are exempt, subject only to the further limitation,

treated later herein, about not being operated as a part or parts of a general steam railroad system of transportation.

The Yonkers Branch is not an electric railway within the intendment of Section 1(22) because it does not and cannot stand alone and apart as an electric railway. Its unified operation and long standing corporate identification with the New York Central Railroad make it so clearly a branch of that railroad that any other assumption is utterly unreal. Much that is said in Point II about the line being operated, in any event, as a part of the New York Central's system of steam railroad transportation is relevant here. The Yonkers Branch has no charter, officers, employees, records, funds or tariffs exclusively of its own, and has no being or existence apart from the New York Central. It makes no separate reports of its own to the Interstate Commerce Commission and functions only as a part of the New York Central. It has, as would any other branch line, certain exclusive tracks and facilities which may be surrendered or dismantled upon cessation of operations, but it is no more separate than any other branch of the New York Central, and is distinguished from other branches only by the incidental fact of electric operation which came about rather late in its carreer largely in response to an invalid statute.

It would thwart the national transportation policy, established by the 1920 legislation, to find the Yonkers Branch to be beyond the protective reach of the Interstate Commerce Commission's power under paragraphs (18) to (21) of Section 1. The Commission in the exercise of its informed and expert judgment has found that "Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce." That finding should not be set aside upon any artificial conception of what constitutes an electric railway, a conception that has no regard for the meaning of the whole statute and disregards its broad purpose to promote and protect a national transportation system.

POINT II

Even though it be an electric railway, which appellees deny, the Yonkers Branch is operated as a part of a general steam railroad system of transportation, and Section 1(22) does not exempt it from the Commission's jurisdiction under Section 1(18) to (21).

The final clause of Section 1(22) restricts the exemption of electric railways to those "not operated as a part or parts of a general steam railroad system of transportation," thus recognizing that there are certain electric railways which, because of their relationship to steam railroads, are to be regarded as a part or parts of a steam railroad system of transportation. The exclusion of street, suburban and interurban electric railways as a class from the general application of this part of the Transportation Act of 1920 is in keeping with its broad purposes. Such lines are usually of local importance only. However, when such electric railways form a part or parts of a steam system of transportation, it is likewise in keeping with the broad purposes of the Act to limit the restriction. Otherwise electric railways would be free to play havoc with the national transportation system and policy.

The clause here involved, as is demonstrated in Point I, never comes into play in this case because the Yonkers Branch is not a suburban or interurban electric railway. It is an electrically operated branch of a steam railroad. Even if it be admitted, *arguendo*, that the Yonkers Branch is a suburban or interurban electric railway, it avails the appellants nothing because the branch is operated as a part of the New York Central Railroad, which is admittedly a general steam railroad system.

The Yonkers Branch is a part of the New York Central both by reason of its corporate and financial identification

with the New York Central and by reason of its functional operation as a part of the New York Central.

While the record before the Commission was not made with the precise objective of proving that the Yonkers Branch was operated as a part of a general steam railroad system, since no such issue was suggested at the hearing, the record fully supports a finding that it was so operated. The record contains a full explanation of the past history and current operation of the line and necessarily discloses its relation to other parts of the New York Central Railroad.

The lower court reviewed the record before the Commission and concluded that authorization of the abandonment was within the jurisdiction of the Commission because the line was operated as a part of the New York Central Railroad. The lower court said:

> "* * * Here we have no doubt but that this railway was so operated. The facts that it was electric and furnished only passenger service and that it could not run over the remaining tracks of the Central's Putnam Division do not control the showing that it was in fact operated by the railroad as a part of that division and its general system. The use of part of the Putnam tracks, the transfers given to other parts of the line, the general repair and maintenance of the Branch, and other details of operation—all appear intertwined with the operation of the system as a whole.
>
> "Without attempting to rehearse here all the significant facts, we may note, as an example of this interconnection, the fact that the bulk of the traffic on the Yonkers Branch transfers at High Bridge or University Heights to the Central's Hudson Division, where suburban trains run to and from the Grand Central Station on a through line whose ultimate and is Chicago. Plaintiffs expressly admit that the suburban or intrastate trains on the Hudson Division are parts of the through steam railroad system to Chicago. Yet so intimately connected is this Yonkers

Branch with the same operation that seats must be provided on the Hudson trains for all the transferred Yonkers passengers merely for the short run from the present end of the Yonkers Branch to the Grand Central Station, whereas those same seats would be available for the Yonkers commuters at the Ludlow and Yonkers stations on the Hudson Division near the present terminus of the Yonkers Branch —the chief alternate means of transportation available for e patrons of this Branch. In other words, the Cen..al now provides on the branch in question service with is substantially duplicated for these passengers on its Hudson Division, concededly within the Commission's jurisdiction. It would be highly unrealistic to say that that duplicating service must be viewed as something apart from even the Hudson Division, not to speak of the Putnam Division, with which it shares trackage. We conclude that the Commission had jurisdiction in the premises" (R. 382-3).

While this is a complete answer to appellants' contentions, it may be helpful to supply the details supporting the court's pronouncements and to point out additional facts which are overwhelming in their implications. The record shows:

1. The Yonkers Branch has been directly operated by the New York Central or predecessor companies for more than 50 years (R. 15). The company which owned the line and leased it to the Central's predecessor up to 1913 was consolidated with The New York Central and Hudson River Railroad Company in that year and that company was in turn consolidated with others to form the New York Central in 1914 (R. 15). The Yonkers Branch is, because of its history, a component part of the New York Central.

2. The schedules of thirty Yonkers Branch trains are adjusted to the schedules of Hudson Division trains to provide a co-ordinated service (R. 188). The co-ordination is evidenced by the public timetables for the Yonkers

Branch (R. 332). This shows operation as a physical part of a steam railroad system of transportation.

3. About 600 passengers per day, aggregating 188,987 in a year, or 62.9 per cent of the total patronage of the line, require accommodations on Hudson Division trains as well as Yonkers Branch trains (R. 30). These passengers used Hudson Division trains to or from Grand Central Station. It would be most artificial to say that one portion of such a trip is not a part of the other or that the both operations are not a part of one system of transportation.

4. The through tickets sold between Grand Central Station and points on the Yonkers Branch not only provide for accommodations on the two divisions, but also carry optional privileges permitting use at certain Hudson, Harlem and Putnam main line stations (R. 224, 344). This feature permits passengers to use these other lines when Yonkers Branch service is not available or convenient, and clearly shows operation as part of one system.

5. The electric cars used on the Yonkers Branch are of the same type as those used on the Central's other suburban lines in the metropolitan area (R. 186). Abandonment of service on the electrically operated Yonkers Branch has resulted in the release of standard equipment formerly used on other suburban lines, and this standard equipment is now being used wherever needed on the New York Central System. Nothing could indicate more clearly that the Yonkers Branch is a part of a general steam railroad system than the fact that its abandonment has provided more coaches for the Central's steam trains operating as far west as St. Louis, Missouri. Soldiers of the United States may now be riding more comfortably because of the abandonment of the Yonkers Branch.

6. There is no separate work on the Yonkers Branch by train service employees (R. 204-5). They are all Putnam

Division men. The employee may be in Yonkers Branch service on one run and in Putnam main line steam service on the next run, all within one tour of duty (R. 245-6). Moreover, for a part of the distance Yonkers Branch trains are operated over the very same rails as are steam trains of the Putnam Division main line. The latter fact should establish beyond any possible dispute that the Yonkers Branch is a part of a general steam railway system of transportation. Such operation must be under co-ordinated regulations, signals and timetables. The trains go through or stop at the same common stations. In a case such as this where co-ordinated operations have been conducted by one company for fifty years, it is beyond all reason to entertain even the thought that the two operations are not a part of one system of transportation.

7. The Board of Directors of the company, in the resolution authorizing abandonment of the branch, described it as "that portion of the Putnam Division of the New York Central Railroad, known as the Yonkers Branch" (R. 13). The resolution further authorized certain named officers to institute proceedings before the Interstate Commerce Commission for a certificate that present and future public convenience and necessity permit of the abandonment, and upon receipt of such certificate "to abandon and remove said portion of the railroad known as the Yonkers Branch." This indicates that directors themselves recognize that the line was a part of the New York Central Railroad.

8. Finally, it should be noted that the $56,941 per year loss, found by the Commission to be "a substantial loss to the applicant" (R. 78), is a charge upon the general revenues of the New York Central Railroad Company. It constitutes, as the Commission found, "an undue and unnecessary burden upon the applicant and upon interstate commerce."

POINT III

Appellants are in no position to complain about the lack of a finding as to whether the line is a suburban or interuban electric railway within the intendment of Section 1(22).

In view of the proof adduced at the hearing before the Interstate Commerce Commission concerning the history and operation of the Yonkers Branch, its long continued functioning, not as an independent electric railway but as a part of the New York Central, and particularly because of the lack of any doubt or question about it at the hearing, it is not surprising that the report of the Commission contains no discussion as to whether the branch is a suburban or interurban electric railway, and, if so, whether it is operated as a part of a general steam railroad system of transportation. There was, under the circumstances, no more reason to discuss such an issue than to discuss whether the line constituted a "spur, industrial, team, switching or side track" within the meaning of paragraph (22) of Section 1..

Though both appellants filed exceptions to the examiner's proposed report and briefs in support thereof, neither appellant requested a finding that the line was a suburban or interurban electric railway within the intendment of paragraph (22) of Section 1 as they now contend. The Commission's Rules of Practice require that each party specify the findings requested.* Such a request was not included in the nine requests for findings made by appellant Tooley (R. 56-7).

The report contains all the affirmative findings necessary to an exercise of jurisdiction in the premises. The

* Rule 91(e) of the Commission's Rules of Practice provides:

"(e) *Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make."

lack of a negative finding as to what the line is not is in no way significant. It is not as if there was a failure to make a positive finding necessary to an exercise of jurisdiction, as in *Florida* v. *U. S.* 282 U. S. 194. If the appellants deemed the matter important, they should have put it in issue at the hearing. Moreover, had they put it in issue they would have had the burden of proving it and still have the burden, even at this point.

Paragraph (22) of Section 1 sets forth certain exceptions to the general coverage of paragraph (18). Paragraph (18) is remedial, containing as it does, the new legislative policy in the Transportation Act of 1920 in respect to the extension and abandonment of railroad mileage, in the interest of creating a national transportation system. It has been liberally construed, *Texas & Pacific R. Co.* v. *Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266; *Colorado* v. *U. S.*, 271 U. S. 153. It follows that in order to effectuate the broad remedial purposes of the act the exceptions contained in paragraph (22) should be strictly construed.

It is well established that where an exception appears in a statute apart from its enacting clause, as is the case here, the party relying upon the statute need not allege or prove that his case does not come within the exception. The burden of alleging and proving that the case falls within the exception rests with the party claiming the advantage of it. 130 A. L. R. 440. More than 100 years ago Mr. Justice Story stated the rule as follows in *United States* v. *Dickson*, 40 U. S. 141:

> "Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the Court below; we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and

objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof * * *" (p. 165).

In *Spokane & Inland R. R. v. United States*, 241 U. S. 344, this Court refused to adopt a broad construction of the phrase "trains, cars and locomotives which are used upon street railways" forming an exception to the general coverage of the Safety Appliance Act, saying:

"* * * But we think the want of merit in the contentions is clear and the unsoundness of the argument advanced to sustain them apparent. We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment * * *" (pp. 349-350).

Moreover, the phrase "not operate as a part or parts of a general steam railroad system of transportation", is a limitation upon the exception of "street, suburban and interurban electric railways". The limitation must also be construed with the remedial purpose of the statute in mind and not in such a manner as to broaden the scope of the exception beyond its plain intendment.

POINT IV

All other points raised by appellants have already been determined by this court in prior decisions.

1. *Whether continued operation of the line does impose an undue and unnecessary burden upon interstate commerce is not a matter for judicial redetermination.*

After full hearing and due consideration the Commission concluded that "Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce" (R. 78). Whether such operation, entailing an annual loss of at least $56,941, is a burden upon interstate commerce is not a matter for judicial redecision. *Purcell* v. *U. S.*, 315 U. S. 381, 385. Nor is the fact that the railroad is generally prosperous at the particular time at all controlling. The lower court completely disposed of appellants' contentions in this regard by saying:

> "Criticism of the conclusion that continued operation of the line was an undue burden on interstate commerce rests primarily upon the claimed present prosperity of the Central, concerning which the Commission made no specific findings. The Commission did, however, write a careful opinion in which it found a loss on the operation of this Branch in excess of $56,000 a year and also set forth several alternative means of transportation—by bus, street railway, and ordinary railroad service—to the middle of New York City, and held that abandonment here was in the public interest. Under the circumstances the evidence before the Commission was adequate, and the Commission's conclusion well within its authority. Simply because the Central was generally prosperous does not mean that the Commission could not authorize the abandonment of a losing branch; otherwise a railroad would stand committed to drains upon its income for costly and unnecessary service until complete bankruptcy intervened. *Purcell* v. *United States*, D. C.

Md., 41 Supp. 309, 313, affirmed 315 U. S. 381, 62 S. Ct. 709, 86 L. Ed. 910; *Town of Inlet, N. Y.* v. *New York Cent. R. Co.*, D. C. N. D. N. Y., 7 F. Supp. 781; *Colorado* v. *United States*, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878; *Transit Commission* v. *United States*, 284 U. S. 360, 370, 52 S. Ct. 157, 76 L. Ed. 342" (R. 383).

2. *The case raises no new or novel issue respecting a conflict between state and federal authority.*

Whatever doubts there may have been at one time as to the proper spheres of state and federal authority in matters of this kind have been set at rest by this Court's decisions in *Colorado* v. *United States*, 271 U. S. 153, and *Transit Commission* v. *United States*, 284 U. S. 360.

The line involved in the *Colorado case* was a narrow gauge railroad physically detached from applicant's other lines, though used in connection therewith. The Yonkers Branch is of standard railroad construction directly connected with other tracks of the New York Central and has coordinated service with other parts of the system. The line involved in the *Transit Commission case* was an electrically operated branch of the Long Island Rail Road comparable in many ways to the Yonkers Branch. Broad claims of unconstitutional invasion of sovereignty were dismissed as being without merit.

No claim is raised here that has not been already decided by this Court.

3. *No substantial claims of lack of due process or fair hearing are raised.*

The claim of lack of due process in respect to the hearing, or lack of rehearing, before the Interstate Commerce Commission so recklessly made by appellant Tooley (pp. 13-17) is without support in law or fact. It was fully dealt with by the court below as follows:

"Denial of a rehearing was clearly within the Commission's discretion, 49 U. S. C. A. § 17(6); the

claimed additional evidence was not of the kind to persuade to a different conclusion. The evidence was claimed to show that a New York subway would be extended to the terminus of the Yonkers Branch, that Yonkers and New York could or would reduce tax assessments, and that the present crisis in gasoline would reduce bus transportation. But the City of New York, which favored abandonment, showed that building of the subway extension was at best a matter for the quite indefinite future and there was no hope of tax abatement there; and if prospects of lessened taxes in Yonkers were brighter, at most the reduction would be less than $9,000 per year. And there were alternative methods of transportation not dependent upon bus service. The suggestion that this loss may be used to reduce Central's excess profits tax suggests interesting possibilities for keeping declining roads alive; it may, however, be safely left with the Commission. The Commission had already allowed plaintiffs a full hearing, although not required by law to do so. *Woodruff* v. *United States*, D. C. Conn., 40 F. Supp. 949; 49 U. S. C. A. §§ 1(1)(a), 20a(6). * * *" (R. 384).

POINT V

The judgment of the court below should be affirmed.

Respectfully submitted,

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The New York Central Railroad Company.

Dated, December 1, 1943.

Appendix.

Pertinent paragraphs of Section 1 of the Interstate Commerce Act.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or

operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this

section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.